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No. 82-1333

In the Supreme Court of the United States

OCTOBER TERM, 1982

15.65 ACRES OF LAND IN THE COUNTY OF MARIN, STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the court of appeals enunciated an incorrect test for determining whether they are entitled to severance damages for injuries flowing from the taking of part of their land and that of another.

On May 12, 1977, a complaint was filed in the United States District Court for the Northern District of California to condemn approximately 15.65 acres of a 164.03 acre tract belonging to petitioners in Marin County, California, for use as part of Golden Gate National Recreation Area (Pet. App. A-3, A-13). Contemporaneous proceedings were also initiated to acquire for the same purpose adjoining lands belonging to Glass and Fitzsimmons (Pet. App. A-13). After a trial in July 1980, the jury awarded petitioners $623,196 in severance damages, on the basis of a jury instruction that permitted them to consider the effect on the remainder of petitioners' property of the frustration of the plans of Glass and Fitzsimmons to improve the roads on

their property, and the probable change to a more restrictive zoning classification resulting from acquisition of all three parcels (Pet. App. A-13, A-16 to A-19).

The court of appeals reversed the award of severance damages on the ground that the district court had misinterpreted *United States* v. *Pope & Talbot, Inc.*, 293 F.2d 822 (9th Cir. 1961), which the court asserted (Pet. App. A-15) required the condemnee landowner to establish "three elements, indispensability, substantiality, and inseparability" before it is entitled to compensation for a decline in value attributable in part to the taking of a neighbor's property.[1] Although the court of appeals found the record sufficient to establish that petitioners were not entitled to compensation for the loss of the possibility of improved access, it remanded the case to the district court to permit petitioners to attempt to "demonstrate that the probability of [more restrictive] zoning was solely attributable to the taking and use of the 15.65 acres" (Pet. App. A-19).[2]

Petitioners contend (Pet. 11-12) that the court of appeals applied an improper standard to their severance claim. Whatever the merits of this contention, it is not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had originally given the instruction now required by the court of appeals. If petitioners are satisfied with the award on remand, their claims

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[1]The court of appeals also reversed the district court's denial of post-judgment interest, relying on its earlier opinion in *United States* v. *156.81 Acres of Land, etc.*, 671 F.2d 336, cert. denied, No. 82-552 (Dec. 13, 1982). That issue is not before this Court.

[2]Both the United States and petitioners challenged the court's ruling on severance damages in petitions for rehearing. The court of appeals amended its opinion (Pet. App. A-25 to A-35) and denied the petitions (Pet. App. A-24). The amended opinion contains the same interpretation of *Pope & Talbot, Inc.*, *supra*, as the original opinion.

will be moot. If, on the other hand, petitioners are dissatisfied, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of the final condemnation award. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1983

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[3]Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.